INDEX

Page

MOTION TO DENY PETITION FOR WRIT OF CERTIORARI . 1

ARGUMENT AND AUTHORITIES 3

CONCLUSION 7

AUTHORITIES

Gray v. Jenkins, 183 Kan. 251, 326 P.2d 319 (1958) 6, 7

Neely v. Board of Trustees, Policemen's and Firemen's Retirement System, 205 Kan. 780, 473 P.2d 72 (197) 5

Strader v. Kansas Public Employees Retirement System, 206 Kan. 392, 479 P.2d 860 (1971) 6

Thompson v. Amis, et. al., 208 Kan. . . ., . . . P.2d . . . (1972) 3, 5, 6, 7

STATUTES

K.S.A. 60-2101(a) 2, 3, 5, 6, 7

G.S. (1949) 60-3301 7

K.S.A. 75-2925 et. seq. (1969) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1564

LORENE THOMPSON, *Petitioner*,

v.

GEORGE C. AMIS, HENRY J. RIOJAS, THEODORE K. SHARP, as members of the Civil Service Board of Kansas; and GEORGE C. AMIS, HENRY J. RIOJAS, and THEODORE K. SHARP, individually; and WALTER F. KUIKEN, Secretary of the Civil Service Board of Kansas; and WALTER F. KUIKEN, individually; and the DEPARTMENT OF ADMINISTRATION of the State of Kansas; and the STATE BOARD OF SOCIAL WELFARE of the State of Kansas, *Respondents.*

RESPONDENTS' MOTION TO DENY AND ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COME NOW the respondents and in response to the petition for a Writ of Certiorari filed herein by petitioner Lorene Thompson, respondents move and pray that the writ be denied for the reason that no constitutional question exists in this matter, but rather, the

sole issue involves a matter of state controlled civil procedure under K.S.A. 60-2101(a).

VERN MILLER
Attorney General
State of Kansas

WOODY D. SMITH
Attorney for the Department
of Social Welfare

FRANKLIN R. THEIS
Chief Attorney
Department of Administration

Attorneys for Respondents

ARGUMENT AND AUTHORITIES

It is respondents contention that the decision of the Kansas Supreme Court (*Thompson vs. Amis, et. al.*, 208 Kan. . . ., . . . P.2d . . . Petition, Appendix A, page 1a, et. seq.) was founded on a matter of procedural jurisdiction, specifically, the jurisdiction of the district courts of the State of Kansas, and did not, as a consequence, as petitioner suggests, generate a question of denial of due process of law under Amendment XIV to the United States Constitution. Support for respondents' contention is aptly stated by the majority opinion entered by the Kansas Supreme Court. Support for petitioners' contention that her right to due process of law was violated by the court's decision would require a finding by this high court that the petitioner, though advised and represented by counsel of her choice throughout, had the right to ignore and neglect a totally adequate and known statutory remedy, wait for a period of over one year, fashion a remedy to suit her desires and strategy, and then, after finding that the court was without jurisdiction of the remedy she fashioned, declare that her own neglect to follow the statutory remedy violated her constitutional rights. The statutory remedy she neglected was provided by K.S.A. 60-2101(a) which insofar as here pertinent provides:

> "A judgment rendered or final order made by a court or any other tribunal, board or officer exercising judicial or quasi-judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court. If no other means for perfecting such an appeal is provided by law, it shall be sufficient

for an aggrieved party to file a notice that he is appealing from such judgment or order with such court, tribunal, board, or officer within thirty (30) days of its entry, and then causing true copies of all pertinent proceedings before such court, tribunal, board or officer to be prepared and filed with the clerk of the district court of the county in which such judgment or order was entered. The clerk shall thereupon docket the same as an action in the district court, which court shall then proceed to review the same, either with or without additional pleadings and evidence, and enter such order or judgment as justice shall require. A deposit as security for costs shall be required by the clerk of the district court as in the filing of an original action. When an action is filed in the district court on appeal or removal from an inferior court the jurisdiction of the district court shall not be limited to only such matters as were within the jurisdiction of the lower court, and the district court may by order permit the issues to be enlarged in the same manner and to the same extent as if the action had been originally commenced in the district court. . . . "

She alleges that the Kansas Supreme Court's construction of this statute was constitutionally defective in that the statute thus (1) precludes an independent judicial review of the law and facts bearing upon the issue of deprivation of a substantial constitutional right; (2) establishes a new "exclusive remedy" rule and applies the same retroactively so as to deprive the petitioner of any judicial remedy to correct the unconstitutional acts of state administrative bodies;

and (3) applies such "exclusive remedy" on its own motion in total contradiction to the clear, committed and unappealed position of the State acting in all its capacities prior to the pending of the matter before the State Supreme Court.

Disposition of petitioner's first allegation can be had by careful reading of the Kansas Supreme Court's opinion in the case, particularly its construction of K.S.A. 60-2101(a). This statute, enacted by the Kansas legislature in the 1963 session, became law January 1, 1964 (See Chapter 303, L. 1963), long before petitioner's dismissal from employment, her subsequent hearings before the State Civil Service Board, and her filing of this action in District Court. Contrary to petitioner's assertion that the Kansas Court's construction "precludes an independent judicial review," not only the statute provides for such review, but the construction of the Civil Service Board's powers as *"quasi-judicial"* by the Kansas Supreme Court establishes in the Board, and thus the reviewing court, the totality of the factual and evidential matters and rulings brought before the Board as well as all the legal issues available to test the validity of the conclusion established. However, like a court of record, with unlimited power to hear, gather facts, and decide, the appealable issues are limited only by the advocates through their presentation of the facts as all the rulings of the court in dealing with these issues of fact and law are subject to review, see *Neely v. Board of Trustees, Policemen's and Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72, and cases cited therein; *Thompson v. Amis, supra*, Petition, Appendix A, at page 8a.

Additionally, K.S.A. 60-2101(a) allows the reviewing court on appeal to review the case, "with

or without additional pleadings and evidence, and enter such order as justice may require." Thus neither K.S.A. 60-2101(a) nor the Kansas Civil Service Act, i.e., K.S.A. 75-2925 et. seq., mandates a *statutory* limitation on judicial review as is the case in some other statutes providing for judicial review of administrative decisions, e.g. *Strader v. Kansas Public Employees Retirement System*, 206 Kan. 392, 479 P.2d 860, cited by petitioner, yet like *Strader*, the principle that evidence, if at all available, must be produced at the administrative hearing is still sound. Failure to produce evidence, given the vast powers of the advocates to compel it through Board process, can only be attributable to the advocate who ignores this evidenciary opportunity. Additionally the administrative body in *Strader, supra*, did not have plenary power. The Civil Service Board of the State of Kansas *has* plenary power, *Thompson v. Amis*, Petition, Appendix A, at page 11(a); *Gray v. Jenkins, supra.* The decision of the Kansas Supreme Court in *Thompson v. Amis, supra*, merely notes the time limit after which review by the courts may not be requested, following the mandate of the statute.

Secondly, petitioner argues that this is a new, exclusive remedy, applied retroactively in her case. As stated, the statute became law on January 1, 1964. To fall within the purview of this statute, the tribunal, board or officer must exercise judicial or quasi-judicial functions. *Gray v. Jenkins*, 183 Kan. 251, 326 P.2d 319, decided in 1958, and cited in Kansas Statutes Annotated under K.S.A. 75-2949 (1969), the Kansas statute concerning dismissal from the State Civil Service, determined that the Civil Service Board of the State of Kansas exercises *quasi-judicial* functions. In fact, it may have been in remembrance

of this case that the State legislature provided the broader and more orderly remedy of appeal by broadening former G.S. 1949 60-3301 to include review of such "quasi-judicial" decisions rather than just "judicial" decisions in its new code of civil procedure, of which K.S.A. 60-2101(a) is a part. Thus, the decision in *Gray, supra*, and the enactment of K.S.A. 60-2101(a), both preceded by many years the dismissal of petitioner and her appeal to the State Civil Service Board; and both effectively stated the procedural law of Kansas. It follows that the decision of the Kansas Supreme Court did not create nor establish a "new 'exclusive remedy' rule" and that its application was certainly not "retroactive" as alleged by petitioner.

Thirdly, petitioner alleges that the Kansas Supreme Court applied the alleged "exclusive remedy" rule on its own motion and that respondents had consented to a contrary construction of K.S.A. 60-2101(a) before the trial court. For the record, the issue of the exclusiveness of the remedy afforded by K.S.A. 60-2101(a) was raised by respondents in their appeal to the Kansas Supreme Court, *Thompson v. Amis, supra.* Neither counsel nor court may confer subject matter jurisdiction on a court at variance and in derogation of a constitutionally secure statutory mandate of the State legislature as is embodied in K.S.A. 60-2101(a).

CONCLUSION

In conclusion, respondents believe, and we feel this high court recognized long ago by *United States, ex. rel., Arrant V. Lane, Secretary of the Interior*, 249 U.S. 367, 39 Sp. Ct. 293, 63 L. Ed. 650 (1918), that

there are good reasons for the expeditious and orderly settlement of grievances in the matter of public employment, where the court stated in *Lane*, *supra*, at page 372:

> "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights to the end that if his contentions be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service. . . . "

There is no reason for this court to hear the claim of petitioner that a wholly available, adequate, and constitutionally secure state procedure is now unconstitutional because of her neglect in pursuing it promptly as the statute directed.

Wherefore, your respondents move and pray that the petition for Writ of Certiorari be denied and that the decision of the Honorable Supreme Court of Kansas be affirmed on the basis that no viable federal constitutional question exists for resolution by this great Court.

Respectfully submitted,

VERN MILLER
Attorney General
State of Kansas
2nd Floor, Statehouse
Topeka, Kansas 66612

WOODY D. SMITH
Attorney for the Department
of Social Welfare
6th Floor, State Office Building
Topeka, Kansas 66612

FRANKLIN R. THEIS
Chief Attorney
Department of Administration
2nd Floor, Statehouse
Topeka, Kansas 66612

Attorneys for Respondents